
IN THE MAY 2 1968
United States Court of Appeals
FOR THE NINTH CIRCUIT

KENNETH WAYNE CLEAVER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 22,558

On Appeal from the Judgment of
The United States District Court
For the District of Arizona

BRIEF FOR APPELLEE

EDWARD E. DAVIS
United States Attorney
For the District of Arizona

JO ANN D. DIAMOS
Assistant United States Attorney
Attorneys for Appellee

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I.

JURISDICTIONAL STATEMENT OF FACTS

The Government accepts and adopts the Jurisdictional Statement of Facts of Appellant with the following additions:

Count I of the Indictment charged Appellant Kenneth Wayne Cleaver, David Luke Stewart, with receiving, concealing and facilitating the transportation and concealment of approximately ten and one-half pounds of bulk marijuana contrary to law, and which they knew had been imported contrary to law, all in violation of 21 U.S.C.A. §176a.

At trial, Appellant had retained counsel; on Appeal different counsel was appointed under 18 U.S.C.A. §3006A; on the day of trial, defendant Black was granted severance for trial from Appellant Kenneth Wayne Cleaver (Reporter's transcript of trial, page 6. Hereinafter the Clerk's Record will be referred to as "RC"; the reporter's transcript of testimony at the hearing of the Motion to Suppress will be referred to as "M RT" and the reporter's transcript of the testimony at trial will be referred to as "RT"; the number following will refer to the page, and the number following "L" will refer to the line. Appellant Kenneth Wayne Cleaver will be referred to as Cleaver or Appellant.)

II.

STATEMENT OF FACTS

While at home in Nogales, Arizona, at approximately 10 p.m. on the night of July 12, 1967, Turner, a Customs Port Investigator (M RT 14), received a telephone call from Customs Inspector Larson, who was stationed at the Grand Avenue Port of Entry (M RT 14). Larson said he had received a call from an informant in Nogales, Sonora, Mexico, who stated that three white American males, two wearing olive drab or green Army jackets, one wearing a black shirt or sweater, were in Mexico trying to purchase marijuana. (M RT

7) Nothing was said about the age of the three (M RT 30-31), about their height and weight (M RT 18) or about where in the Mexican city they were (M RT 17), and the informant apparently did not indicate the basis for his conclusion that three Americans were attempting to buy marijuana. Larson told Turner the informer's name (M RT 7) and Turner recognized the name of the man as one who had provided information some 20-25 times over the past 11 or 12 months (M RT 14-15), the information proving to be reliable in approximately 60% of the cases (M RT 72).

Turner went immediately to the Port of Entry, called Agent Washington, and asked Washington to meet him at the Port (M RT 16, 14). When Washington arrived, Turner told him of the call Larson had received (M RT 46); Washington remained at the Gate while Turner went into Mexico to investigate (M RT 46). When Turner had been in Mexico for about 15 minutes (at about 10:30 p.m.) (M RT 18-19), the informant again called the port. Speaking to Washington, the informant said, "They have jumped the fence up by the cemetery, by the Mexican cemetery with a bag of marijuana" (M RT 47). Washington recognized the voice of the informant as the same person that had called Larson (M RT 47) and Washington immediately established radio contact with Turner and told him of the message (M RT 8, 48). Neither Washington nor Turner personally saw anyone jump the fence (M RT 20, 31), and the informant did not say that he saw the young men cross the border, nor did he disclose any underlying facts or circumstances that led him to conclude that they had done so (M RT 47; 76-77).

As a result of the radio message from Agent Washington, Turner returned to the United States (M RT 8) and proceeded to the end of the chain link fence, which is three miles

west of town, in pursuit of the men (M RT 66). Finding no sign of them, Turner returned to Mexico in an attempt to locate the informer; he did so, and asked the informer if he was sure they had crossed the fence and the informer replied he was sure (RT 66) and told him the men had been dealing with a certain individual, Gradillas, that they had a bag, and that they had crossed the fence (M RT 66). Gradillas was known to the agent as a dealer in narcotics and marijuana (M RT 69, L 13-14 and 18).

The informer did not tell Turner there had been a buy from Gradillas—only that the men had contacted Gradillas (M RT 69). The informer did not say that he personally observed a sale (M RT 69-70), nor did the informer tell the Agent how he had occasion to know Gradillas (M RT 69-70). Turner did not go into the basis of the informer's knowledge since he left immediately to get back across the Line (M RT 76-77).

After speaking with the informer, Turner returned to the United States, and this time drove west on International Street, which parallels the international fence for approximately one mile (M RT 66-67; RT 23), and which then leads to a path in the brush passable by pedestrians (M RT 21). As he drove into the area, Turner saw, at a point one-half mile west of the port, two young men walking from the brush at the end of the road walking east towards town (M RT 8-9).

One of the young men was wearing an olive drab Army jacket, the other a black sweater (M RT 9). Turner came within three feet of the two and could see them rather clearly (M RT 23-24); the area they were walking in would make Turner suspicious (M RT 24). The area along International Street is residential, with houses extending all the way to the west end of the street (M RT 37; RT 39). There are six

houses in the immediate vicinity. On the Mexican side of the fence is a cement-enforced canal with houses and quite a bit of light (RT 68-69).

Turner, in his unmarked car with a 5-foot police radio aerial (M RT 23-24), drove right past the two men, proceeded to the west end of International Street, turned around, drove past the men again, parked his car somewhat further east, and got out of his car in order to follow the men on foot (M RT 23). He followed them for about five blocks (M RT 9, RT 25) through a well lighted and residential area which also has government offices which are closed after 5:00 p.m. (RT 73-77); they were walking on the sidewalks in an average manner and were not carrying anything (RT 73-76).

Next, the two men entered a red Falcon Ranchero bearing California plates, and drove off (M RT 10). Turner lost surveillance for approximately half a minute (M RT 40-41) while he ran back to his own car, but then followed the Ranchero, which returned to the area near the fence (M RT 9). They stayed three or four minutes in the area near the fence during which time the Ranchero was not in his view (M RT 9). When the Ranchero returned there were three people in it (M RT 9). The Ranchero turned North on Hereford Street to Crawford to Sonoitta and back to International Street (M RT 9). Turner then proceeded north on Grand Avenue (M RT 10); Turner waited and saw the Ranchero go past approximately one mile north of the port, make a U-turn and stop in front of a Richfield Station headed south (M RT 10). It was not again seen until some 10-15 minutes, except when Agent Swindler, who was sent to pass the station, saw them still there (M RT 86). Swindler parked some distance away (M RT 86). When the car was seen headed north by the other agents, Turner, Washington and Cameron, Swind-

ler was sent to check the closed Richfield Station to see if they had left anything there, and found nothing; he so reported to the other agents (M RT 86).

Swindler caught up with the other agents who then at approximately twelve miles north of the port stopped the Ranchero (M RT 11). During this drive, the Ranchero would slow down and speed up as if looking for a tail; the officers waited until they were sure that the Ranchero wasn't going back to town, that they already had the contraband (M RT 11). All three men were in shirtsleeves when stopped (RT 34). A search that followed the stopping of the vehicle revealed ten and one-half pounds of marijuana in a bag under the hood (M RT 52; RT 30) and 115 benzedrine tablets wrapped in a wet olive drab jacket and a wet black sweater in the back of the Ranchero (M RT 52) and one tablet on the person of Cleaver (RT 33, 129), (as well as one tablet on Stewart's person (RT 129)). Cleaver had grimy hands (RT 95) and Turner in getting the bag out of the engine compartment got his hands greasy (RT 30).

III.

OPPOSITION TO SPECIFICATION OF ERRORS

1. The search twelve miles north of the border was not sustained as a border search but was a search based on probable cause.

2. The information, coupled with the observations of the agents corroborating the informer's information and the Appellant's movements constituted probable cause.

IV. ARGUMENT

The search, based on information and the observations of the agents corroborating the information and the Appellant's movements, was a search based on probable cause.

Appellant's counsel argues for some five pages that the search cannot be sustained as a border charge. Count I of the Indictment charged receiving, concealing, etc., not importation or smuggling. The Government in its Memorandum in Opposition to Appellant's Motion to Suppress or in the Alternative to Disclose Confidential Informant (RC, Item 4) alleged the search was based on probable cause and that no grounds had been asserted for revealing the informant, *Roviaro v. United States* (1957) 353 U.S. 53, 77 S.Ct. 623, 1 L.E. 2d 639, and therefore, the Government's privilege may be invoked, *McCray v. Illinois* 1967) 386 U.S. 300, 87 S.Ct. 1056, 18 L.E. 2d 62.

At the hearing on Appellant's Motion to Suppress Evidence, or in the Alternative to Disclose Name of Confidential Informant, Government's counsel stated the Government's search was not based on border search (M RT 4, L 16-23). Why Appellant's counsel still argues it was not Border search is not apparent to Appellee.

Title 19 U.S.C.A. §1461, does provide that a person entering the country must unladen his baggage and unlock his vehicle, etc. However, 19 U.S.C.A. §482 provides that Government officers may both within or without their districts stop and search any vehicle in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law.

In *Bailey v. United States* (5th Cir., 1967) 386 F.2d 1 at pages 203, the Fifth Circuit held:

"As this was a warrantless search not incident to an arrest, the government either must have a finding that probable cause existed or must excuse its absence by resort to the border search doctrine. No case has held that one who has not crossed an international boundary can be the object of a constitutionally permissible border search, and we do not reach that question. Rather, we assume the view of the searching officers, and hold that 'the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief' that appellants were, when searched, possessed of illegal narcotics."

In *Sirimarco v. United States* (10th Cir., 1963) 315 F.2d 699, the Tenth Circuit held, under the statute providing for seizure of vehicles used to transport counterfeit bills, 49 U.S.C.A. §781 (3), that the agent had probable cause to transport counterfeit bills and that, since he had the right to seize the car, the search was lawful even though he did not first assert formal control over it.

Title 19 U.S.C.A. §1595a provides:

"(a) Except as specified in the proviso to section 1594 of this title, every vessel, vehicle, animal, aircraft, or other thing used in, to aid in, or to facilitate, by obtaining information or in any other way, the harboring, or subsequent transportation of any article which is being used or has been introduced, or attempted to be introduced, into the United States contrary to law, whether upon such vessel, vehicle, animal, aircraft, or other thing or otherwise, shall be seized and forfeited together with its tackle, apparel, furniture, harness or equipment."

The car was subject to seizure.

At the hearing on the Motion to Suppress, the Court asked Agent Turner the following:

"BY THE COURT:

"Q. This Nogales area, how would you describe the activity there with regard to bringing in or attempting to bring in narcotics, marijuana and so on and so forth?

"A This generally west fence area?

"Q The Nogales area, where you are stationed and where this activity took place.

"A There is a great deal of activity as to bringing in narcotics.

"Q Can you give me, say in the last year, can you give me in round figures approximately the number of arrests you have made of people, not you personally but the officers there at the Border?

"A Yes, sir. I believe the last fiscal year, to the best of my recollection, because it came up a while back, I believe two hundred arrests last year in connection with narcotic cases.

"Q How many of them are arrests where narcotics or contraband was found and prosecution was successful?

"A Of those two hundred cases, I would say prosecution was successful probably in eighty per cent.

"Q This man that got the information to you and whom you later contacted, he has been described as the informer. Have you had information from him prior to this time?

"A Yes, sir.

"Q Has this information been pursued?

"A Yes, sir.

"Q On occasion. Has it resulted in cases being made, arrests being made?

"A Yes, sir, it has.

"Q What percentage of the time have you found in the cases have you found his information to be accurate?

"A This particular informer, I would say around sixty.

"Q Sixty per cent?

"A Sixty per cent.

"Q Where you located these two men leaving or walking away from the fence, where is that with reference to the cemetery that has been described?

"A The only cemetery that I know of in relation to close to the fence, is about ten and a half miles west of the center of Nogales, the Grand Avenue Port of Entry, on the Mexican side, probably two to three hundred yards south of the International fence, almost immediately south of where the International fence ends, the chain link fence.

"Q Where was that in relation to where you saw these men?

"A That is about two miles west of where I saw these men.

"THE COURT: I believe that is all I have.

"MR. THIKOLL: Would the Court permit a few more questions? I didn't know the Court's position whether there would be any judicial notice taken of the activity at the Nogales Port of Entry. I haven't asked any questions on that subject.

"THE COURT: I am bound to take some notice of it inasmuch as I would say eighty per cent of my time in court now is devoted to narcotics arising in Nogales. I thought I would get it on the record with the witness, but I know these things actually from sitting here and hearing the cases." (M RT 70, L 23 to 73, L 5)

The Court found:

"THE COURT: You are forgetting Mr. Washington's testimony. When he was on the phone and talked to the informer and the informer said, "They have got a bag of grass and they have gone over the fence."

"MR. DAVIS:" (attorney for defendant Stewart) "I think the testimony is conflicting. One says they have a bag and the other says they have a bag of grass.

"THE COURT: It is two different conversations. It is a conversation with Mr. Washington and a conversation with Mr. Turner. Mr. Turner rushes back and said: 'Are you sure these guys went over the fence?' He said: 'Yes, they have a bag and went over the fence.' And without more he goes back. He doesn't say a bag of what. He has got the information that he wants and he leaves. This thing is done under a little bit of pressure, it isn't something that he can cross examine the informant about and still find the people you are looking for.

"MR. DAVIS: But then we go, Your Honor, to the description. We have a description of two OD jackets, whatever they were, whether they were fatigue or field, I don't think makes too much difference, two OD jackets and a black sweater. This is it. No description of the men, they could have been men eighty-five years old, could have been men fifteen years old. They could have been any description of this and I would venture to say that there are thousands of people, especially in Nogales, Arizona, wearing OD jackets. These are things that are bought in Army surplus.

"THE COURT: You can subdivide this thing beautifully, but are there thousands of people in Nogales where two of them would be wearing, one an OD jacket or a military jacket and one a black sweater and will be at a point by the fence where the informer has indicated in the middle of the night.

"MR. DAVIS: No one saw two men with OD jackets and a black sweater at a point —

"THE COURT: They saw one man with a military jacket and one man with a black sweater. That is two out of three. Then later on they went back to the very point from which they were walking and got the vehicle and went back, two of them went back and came out with a third.

"MR. DAVIS: But this third, the only evidence as to what this third was wearing is evidence that was obtained by the search and seizure at the time.

"THE COURT: That isn't important. You have two that meets the description and one isn't even there, but when they go back to the fence area, they come out with a third. Common sense would lead you to believe that they went back for this fellow, he stayed there for some reason, and a pretty good reason would be that he was going to be there with the stuff until they brought the vehicle back. I think you can of course subdivide a thing and resubdivide, but as the Draper case says and all the cases say, the ultimate question is whether the facts and circumstances within the knowledge of the agents, and this is all of the agents, not just one alone, but the agents as a whole, what they all knew together, whether on a basis of that they had reasonably trustworthy information that was sufficient to warrant them as men of reasonable caution in believing that the defendants were committing an offense, namely, that they were facilitating the transportation of marijuana. I think on the basis of the evidence, the fact that Mr. Turner gets a message from this informant he has had previous experience with and who on the basis of what he says about the information, I find to be a reliable informant, he gets the information that these men, describing their dress, their apparel, in Nogales and attempting to make a buy of marijuana. He goes immediately over to Mexico trying to locate the informant,

which he is unsuccessful, trying to locate the three men dressed as has been indicated and he is unsuccessful, but he gets a call from Mr. Washington who says: 'I have talked to the informant, the same reliable informant, and he tells me these fellows have bought marijuana and have gone over the fence, have jumped the fence.' With that Mr. Turner comes back to Arizona, he can't find the people where he thinks they ought to be, so he goes back, verifies with the informant that they have gone over the fence and have a bag at least, that is the expression. He goes again and he finds two people meeting the description of the informant, people that the informant has described to him, he keeps them under observation, sees them get into a Ranchero wagon, go back in the vicinity of the fence where they had come from, and when they come out they have a third person with them. Then from the testimony of the various agents, begins the procedure of going north, turning back, going north and turning back, driving slow, driving fast. As was described by one of the agents, conduct to indicate they were trying to find out if they were being pursued. In other words, conduct which would indicate a little bit of fear they might be involved in something they shouldn't and might be being observed.

"On the basis of all the evidence, I find that the information the officers had, the reasonably trustworthy information they had, it doesn't have to be one hundred per cent, just reasonably trustworthy information, at the time they stopped and searched the vehicle was sufficient in itself to warrant men of reasonable caution and belief, and the agents did believe that the defendants were committing the offense of facilitating the transportation of marijuana, and the Court concludes therefore the search was lawful." (M RT 89, L 11 to 93, L 5)

Further, it is respectfully submitted, once the informant's information is corroborated by the agent's own observations, the informant need not be revealed to sustain the finding of probable cause. *Draper v. United States* (1959) 358 U.S. 307

at 313; 3 L.E. 2d 327, 79 S.Ct. 329; *Rocha v. United States* (9th Cir., 1967) 387 F.2d 1019 at page 1023; *Lemons v. United States* (9th Cir., dated February 28, 1968) No. 21,940, F.2d at page (Page 4 of Slip Sheet Opinion).

Thus, with the information as to three men, two in O.D. Army jackets and one in a black sweater or jacket seen with Gradillas, a known narcotic dealer, who have gone over the fence with a bag of grass, and the agents see two men, one in a black sweater and one in an Olive Drab Army jacket walking from the brush onto International Street, in an area that is residential, going to a parked car, go back to the west end of International Street and return in 3 or 4 minutes with a third occupant, the information was corroborated. The car goes into a residential area, and then goes on to Grand Avenue which is the highway going north, makes a U-turn and stops, remains there about 10 or 15 minutes, drives north fast and then drives slow and fast again, as if checking for a tail, all of which constituted facts "sufficient in themselves to warrant a man of reasonable caution in the belief" that the car would contain "grass," i.e., marijuana.

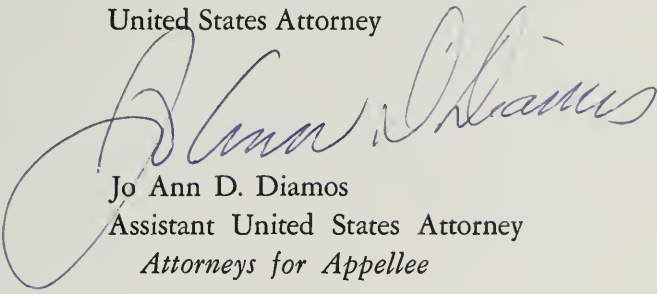
V.

CONCLUSION

It is respectfully submitted the agents had probable cause to stop and search the vehicle and probable cause to believe the Appellant and the two other men were receiving, concealing, and facilitating the transportation and concealment of marijuana.

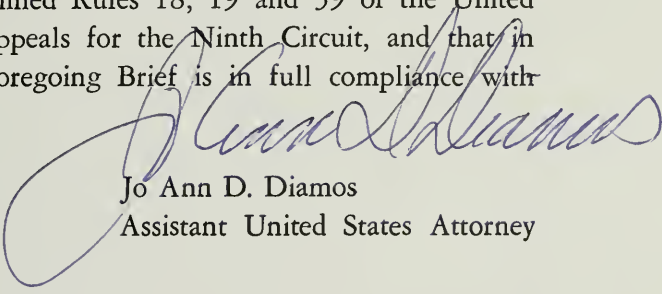
Respectfully submitted,

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I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing Brief is in full compliance with those rules.



Jo Ann D. Damos
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Three copies of the Brief of Appellee mailed this 1st day of May, 1968, to:

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